Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

BASTROP COUNTY, TEXAS,

Petitioner,

v.

BOBBY JOE JANES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT S. DAVIS
FLOWERS, DAVIS, FRASER,
DERRYBERRY & VAN CLEEF, L.L.P.
Attorneys for Petitioner
815 Rice Road
Tyler, Texas 75703
(903) 534-8063

163314

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

60PP

QUESTIONS PRESENTED

I. Whether established precedent requires that a jury must first decide that a public servant acted with subjective indifference to the plaintiff's rights, and only after finding that element, consider whether the employee's act resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference to the plaintiff's rights.

II. Whether the Fifth Circuit's decision is contrary to established Supreme Court precedent in that it imposes on municipalities a greater duty to protect convicted prisoners than pretrial detainees.

III. Whether the Fifth Circuit erroneously ignored the lack of a causal link between an act or omission by the County and the risk that Janes would be injured.

IV. Whether the term "prisoner" in the Prison Litigation Reform Act refers to one incarcerated at the time of injury or incarcerated at the time of filing of the lawsuit.

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Petitioner Bastrop County, Texas respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 7, 2000, and the denial of Petition for Panel Rehearing and Petition for Rehearing *En Banc* dated August 16, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Janes v. Hernandez*, 215 F.3d 541 (5th Cir. 2000) and is set out in Appendix A at 1a. It is a consolidated appeal of appellate cause numbers 99-50092 and 99-50141. In an unreported order, the panel denied rehearing and rehearing *en banc* on August 16, 2000. The order denying rehearing and rehearing *en banc* is set out in Appendix D at 29a. Cause number 99-50092 was an appeal from the district court's unreported amended order entered on December 10, 1998. The district court's order is set out in Appendix B at 4a. Cause number 99-50141 was an appeal from the district court's unreported order awarding attorney's fees entered on January 26, 1999. The district court's order regarding attorney's fees is set out in Appendix C at 16a.

STATEMENT OF JURISDICTION

The Fifth Circuit rendered the judgment sought to be reviewed on July 7, 2000 and denied rehearing and rehearing en banc on August 16, 2000.

This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution. Those amendments are set out in their entirety in Appendix E at 31a. This case also involves the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983, which is set forth in its entirety at Appendix E at 32a. Finally, this case also requires this Court to interpret the Prisoner Litigation Reform Act, 42 U.S.C. § 1997e(d), set forth in Appendix E at 33a.

STATEMENT OF THE CASE

On September 22, 1995, Plaintiff/Respondent Bobby Joe Janes (hereinafter "Janes") was arrested for outstanding warrants for traffic violations and a motion to revoke his probation. Janes was not a "first offender," and sheriff's office officials placed him in a multiple occupancy tank designated "MO-8." Bruce Veal ("Veal"), also a repeat offender, was incarcerated in MO-8 and had been incarcerated in Bastrop County Jail on eleven previous occasions. During all periods of Veal's confinement, he had never exhibited any violent behavior.

On September 25, 1995, Janes complained to a jailer that he thought he was going to be assaulted and that Veal had verbally harassed him. The jailer called Sergeant James Hoffman ("Hoffman"), who refused permission for Janes's removal to another area. Thereafter, Veal kicked Janes in the back of his head. Janes's face hit the plexiglas window of the tank, and he suffered facial lacerations and loss of teeth.

On July 25, 1997, Janes filed a section 1983 action against Hoffman in his individual and official capacities, and against Bastrop County (the "County").[1] The subject matter jurisdiction of the trial court was properly invoked pursuant to the provisions of 28 U.S.C. §§ 1331 and 1443. The district court instructed the jury that, in order to find Hoffman liable for Janes's injury, it must find that Hoffman actually knew of a substantial risk of serious harm to Janes and disregarded that risk. The jury refused to find that Hoffman was deliberately indifferent. Regarding Bastrop County, the court instructed the jury that the County could be liable for failing to protect a prisoner from injury by another prisoner if the county had a policy or custom that was adopted or maintained with deliberate indifference to Janes's constitutional rights, and the policy or custom was the moving force behind a violation of those rights. Over the County's objection, the district court refused to submit the County's liability conditioned on a finding of Hoffman's liability. The jury found the County liable for Janes's injury.

Based on the jury's verdict, the district court entered judgment that plaintiff take nothing by his claims against Hoffman in his individual capacity, but rendered judgment against Hoffman in his official capacity and against the county. On the motion of Hoffman and the County, the court amended its judgment to dismiss the claims against Hoffman in his official capacity. Only the judgment against the County remains.

On December 23, 1998, the Magistrate Judge issued an order that applied the attorney's fees provisions of the Prison

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1. Janes's suit included various other defendants who were dismissed prior to trial.

Litigation Reform Act (the "Act" or "PLRA") to Janes's claims. However, the court later refused to apply the PLRA. The court unreasonably distinguished between inmate claims filed while a plaintiff is incarcerated and those filed after release.

The County appealed the orders to the United States Court of Appeals for the Fifth Circuit. In that appeal, the County asserted five issues for review. In the first issue, the County argued that the district court erred in refusing to require a finding of Hoffman's liability as a prerequisite to its own liability. In its second, third, and fourth issues, the County asserted that Janes failed to present legally sufficient evidence of two essential elements of his case. Specifically, Janes presented no evidence that the County's inmate classification and separation system was unconstitutional or that Bastrop County knew but disregarded a substantial risk of harm to Janes. Finally, the County contended that the court erroneously refused to apply the Prison Litigation Reform Act to Janes's request for attorney's fees.

In a very brief opinion, the Fifth Circuit affirmed the district court's judgment. However, the Fifth Circuit failed to address the County's first issue on the conditional nature of its liability. Further, the court misstated the standard for county liability. Finally, the Fifth Circuit erroneously held that the Prison Litigation Reform Act applies only to suits filed by prisoners while they are prisoners and not after.

ARGUMENT

Bastrop County presents the following argument and petitions this honorable Court to grant certiorari to review the decision of the Fifth Circuit for the following reasons:

1. In conflict with its other recent decisions, the Fifth Circuit's opinion has inexplicably lowered the standard for establishing county liability for an attack on a prisoner by another prisoner.

Section 1983 creates a private right of action for violations of federal law by those acting under color of state law. 42 U.S.C. § 1983; *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 82, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). Section 1983 does not provide a remedy for every wrong, however, and a plaintiff must identify a federal constitutional violation to state a claim under that section. *McGruder v. Will*, 204 F.3d 220, 222 (5th Cir. 2000).

The State has a duty to provide certain basic human needs of both pretrial detainees and convicted prisoners. *Hare v. City of Corinth*, 74 F.3d 633, 639 (5th Cir. 1996). Although the two groups enjoy the same rights, those rights have divergent constitutional sources. *Id.* The Eighth Amendment guarantees a convicted prisoner the right to be free from cruel and unusual punishment. U.S. CONST. amend. VIII; *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994). The Amendment requires that prison officials provide humane conditions of confinement, ensure that "inmates receive adequate food, clothing, shelter, and medical care, and . . . 'reasonable measures to guarantee the safety of the inmates.' " *Farmer*, 511 U.S. at 832, 114 S. Ct. at 1976 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27,

104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)). However, the Eighth Amendment does not apply to pretrial detainees because they have not been convicted and may not be punished at all. *See Bell v. Wolfish*, 441 U.S. 520, 535-37, 99 S. Ct. 1861, 1872, 73, 60 L. Ed. 2d 447 (1979). It is the substantive and procedural due process guarantees in the Fourteenth Amendment that apply to pretrial detainees. *Hare*, 74 F.3d at 639. As there is no constitutionally significant distinction between the rights of pretrial detainees and convicted inmates, liability to either group must be measured by the deliberate indifference standard enunciated by this Court in *Farmer*. *See Hare*, 74 F.3d at 643.

In order to evaluate a claim of constitutional injury inflicted on either a convicted prisoner or a pretrial detainee, the court must initially decide whether the alleged violation is an attack on the conditions of confinement or an episodic act or omission. *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 526 (5th Cir. 1999); *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997) (*en banc*) (enumerating examples of conditions of confinement cases, including the revocation of telephone, television, cigarette, mail, and visitation privileges; overcrowding in prisons; and refusing drugs for rehabilitation). By contrast, in an episodic act or omission case, the plaintiff complains of a particular act or omission of one or more officials. *Scott*, 114 F.3d at 53. Generally, a state actor is interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission. *Id.*; *see also Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) (confining plaintiff to administrative segregation was episodic act); *Olabisiomotosho*, 185 F.3d

at 526 (failure to take care of plaintiff, medically screen her, and secure her treatment were episodic acts). Occasionally, plaintiffs attempt to circumvent the requisite proof in an episodic case by characterizing their complaints as conditions of confinement. *Scott*, 114 F.3d at 53. However, courts must look behind a plaintiff's characterization to determine the true nature of his allegations. *Sibley v. Lemaire*, 184 F.3d 481 (5th Cir.), *cert. denied*, __ U.S. __, 120 S. Ct. 1420, 146 L. Ed. 2d 312 (2000) (prisoner plucked his own eyes out and complained that the jail treated all violent prisoners the same); *Flores v. County of Hardeman*, 124 F.3d 736, 739 (5th Cir. 1997) (prisoner committed suicide, but plaintiff characterized as lack of training and supervision by staff); *Scott*, 114 F.3d at 53 (although prisoner attempted to characterize her rape by a jailer as a condition of confinement, *i.e.*, lack of training and supervision of jail personnel, court correctly noted that her actual harm was the sexual assault committed by the jailer, an episodic event). In *Scott*, the Fifth Circuit noted that the victim "did not suffer from the mere existence of the alleged inadequate [policies], but only from [the attacker's] specific sexual assaults committed on but one occasion." *Scott*, 114 F.3d at 53.

In order to hold a municipality liable for an employee's episodic act or omission, the plaintiff must prove two elements. First, a plaintiff must establish that a public official acted with subjective deliberate indifference to his rights. *Olabisiomotosho*, 185 F.3d at 526; *Scott*, 114 F.3d at 54; *Hare*, 74 F.3d at 649 n.4. This proof establishes a violation of the plaintiff's rights under the constitutional provision and is a prerequisite to municipal liability. *Hare*, 74 F.3d at 649 n.4. Thereafter, in order to hold the municipality liable for the act of its employee, the plaintiff must also prove that the employee's act resulted from a municipal policy or

custom adopted or maintained with objective deliberate indifference to the plaintiff's constitutional rights. *Olabisiomotosho*, 185 F.3d at 526; *Scott*, 114 F.3d at 54; *Hare*, 74 F.3d at 649 n.4. The plaintiff must prove both elements.

Janes's complaint must be characterized as an episodic act or omission case. Like the plaintiff in *Scott*, Janes has attempted to cast his complaint as a conditions of confinement case. Janes argues that the inmate housing policy at the Bastrop County Jail caused his injuries. However, Janes's injury resulted from the acts of another inmate and the alleged indifference of Hoffman, not the conditions present in the Bastrop County Jail. *See Edwards*, 209 F.3d at 778 (placing plaintiff in administrative segregation was episodic act); *Scott*, 114 F.3d at 53 (plaintiff suffered harm due to the act of a jailer and therefore complained of episodic act). Plaintiff's complaint, therefore, is of an episode or omission, not the conditions of his confinement.

The jury's findings were inadequate to impose liability on Bastrop County. The jury found that Bastrop County's employee, Hoffman, was not deliberately indifferent to Janes's constitutional rights. Because the jury answered Hoffman's liability question in the negative, the jury should never have considered the County's liability. However, the district court erroneously refused to instruct the jury that it should only consider the County's liability if it found Hoffman liable. In order to hold the County liable, the jury had to first find Hoffman was deliberately indifferent to Janes's rights.

2. The Fifth Circuit's opinion conflicts with prior decisions of this Court in that it affords greater protection to a convicted prisoner than a pretrial detainee, when this Court has firmly stated that pretrial detainees are due protections at least equal to those of convicted prisoners.

The Fifth Circuit's opinion did not address the County's first issue regarding the conditional submission of liability. By failing to require a finding of employee liability, the Fifth Circuit has ignored this Court's statements regarding the rights of convicted prisoners.

A pretrial detainee enjoys rights as least as great as those of a convicted prisoner. *See Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 2983, 77 L. Ed. 2d 605 (1983). Stated another way, a convicted prisoner's rights cannot be greater than those of a pretrial detainee. Clearly, a pretrial detainee is required to prove *both* that a municipal employee was subjectively indifferent to his rights *and* that the employee's act resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference to the plaintiff's constitutional rights. *Olabisiomotosho*, 185 F.3d at 526; *Scott*, 114 F.3d at 54; *Hare*, 74 F.3d at 649 n.4. This is a greater standard of proof than the Fifth Circuit has required of Janes, a convicted prisoner. However, by ignoring the County's first issue, the Fifth Circuit has given implicit approval to the district court's erroneous submission.

3. The Fifth Circuit's opinion ignored the necessity for a causal link between an act or omission by the County and the risk that Janes would be injured.

In the second, third and fourth issues raised in the Fifth Circuit, Bastrop County argued that Janes failed to introduce legally sufficient evidence that the County, through its policy makers, knew that it was highly likely that Janes would be harmed and nevertheless disregarded the risk. Because the evidence was wholly insufficient, the district court should have granted the County's motion for directed verdict or its motion for judgment as a matter of law.

A municipality, such as a county, may not be held liable under section 1983 simply because it employs a tortfeasor. *Board of County Comm'rs v. Brown*, 520 U.S. 397, 402, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626 (1997). Similarly, a municipality may not be held liable solely because an inmate has attacked and injured another inmate. *See Marsh v. Butler County*, 225 F.3d 1243 (11th Cir. 2000); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1582 (11th Cir. 1995). Rather, a plaintiff who seeks to impose liability on a municipality under section 1983 must identify a municipal policy or custom that caused his injury. *Board of County Comm'rs*, 520 U.S. at 402, 117 S. Ct. at 1388; *see also Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978). Once a plaintiff has identified conduct attributable to the municipality, he must then demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. *Board of County Comm'rs*, 520 U.S. at 404, 117 S. Ct. at 1388. Explaining the concept of "moving force," this Court stated, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and

must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.* Regarding the requisite degree of culpability, the plaintiff must demonstrate that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. *Board of County Comm'rs*, 520 U.S. at 407, 117 S. Ct. at 1390.

Janes has alleged that Bastrop County's jail housing policy led to his injuries. In order to prove such allegation, Janes must have demonstrated that Bastrop County maintained a policy or custom of housing prisoners; that the County, through its policymaker the sheriff, knew the policy or custom caused the deprivation of constitutional rights, in this case, inmate violence; and that the sheriff was deliberately indifferent to that result. The evidence was wholly insufficient to establish these elements.

Bastrop County had a rational classification system for housing inmates. First offenders were housed separately from the general population, or repeat offenders. Although there was evidence that "fights" occurred in the jail, there was no evidence to support an inference that the fights were physical rather than verbal, or that the fights occurred in the repeat offenders unit. Further, Veal, the actual inmate who attacked Janes, had been incarcerated on twelve occasions, but had never demonstrated any propensity for violence. Because Janes complains that the County's housing policy caused his injury, he was required to prove that the sheriff knew that violence was prevalent, not just in the jail, but specifically in the repeat offenders unit. This he failed to do.

In its opinion, the Fifth Circuit panel observed,

> Janes only needed to prove that the policymaker knew there was a substantial risk of serious harm to the inmates under his policy or custom of housing all manner of inmates together. That policy created an unsafe jail and the substantial risk that inmates would be injured. Fights were the order of the jail, to which the sheriff was necessarily deliberately indifferent.

Janes v. Hernandez, 215 F.3d 541, 543 (5th Cir. 2000). There are two problems with the Fifth Circuit's statement. First, the court ignored the issue of causation. Janes was required to prove that the act or omission of the county caused the excessive risk of violence, which in turn caused Janes's injury. *See Marsh*, 225 F.3d at 1250. Second, the court's analysis was not based on evidence. There was no evidence that the housing policy promoted any violence in the jail. There was no evidence that the jail "fights" involved physical violence. There was no evidence that any inmate had been injured prior to Janes's injury. The sheriff could not have been deliberately indifferent to the risk of injury because there was no evidence of prior injury or physical violence.

4. The Fifth Circuit's opinion erroneously refused to apply the attorney's fees provisions of the PLRA to Janes's claims simply because he was no longer a prisoner at the time he filed his claim. This interpretation, although followed by some other appellate courts, is contrary to the meaning and intent of the statute. This Court has not yet addressed the relevant time period to determine whether a person is a prisoner within the meaning of the act.

The Magistrate Judge originally issued an order applying the Prison Litigation Reform Act, which limited the amount of attorney's fees available to Janes. However, the court later reversed its decisions and stated that the Act did not apply because Janes was not a prisoner at the time he filed his lawsuit. The Fifth Circuit affirmed the trial court's refusal to apply the Act, relying on seventh and eighth circuit cases.[2] Petitioner Bastrop County does not dispute that other circuits have also decided this issue contrary to its contention. However, Petitioner asserts that the appellate courts have erroneously decided the issue, and requests this Court to apply correct standards of statutory construction.

Subsection (d) of 42 U.S.C. § 1997e states, "in any action brought by a prisoner who is confined to any jail, prison, or other correctional facility. . . ." 42 U.S.C. § 1997e(d).[3] However, the meaning of the phrase, "brought by a prisoner," is unclear. It is impossible to determine from the statutory

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2. The Fifth Circuit opinion relied on *Doe v. Washington County*, 150 F.3d 920, 924 (8th Cir. 1998) and *Kerr v. Puckett*, 138 F.3d 321 (7th Cir. 1998).

3. The section goes on to limit the attorney's fees available to a "prisoner."

language whether Congress intended it to apply to persons who were prisoners at the time of injury or at the time of filing their lawsuits. Therefore, this Court must resort to statutory interpretation of the ambiguous language.

In interpreting a statute, a court must look to the plain language of the statute, "[s]pecific words within a statute . . . may not be read in isolation of the remainder of that section or the entire statutory scheme." *Davis v. Fechtel*, 150 F.3d 486, 488 (5th Cir. 1998). Where statutory language is ambiguous, the overall purpose and scheme of the legislation must be considered in interpreting the statute. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001-02, 108 L. Ed. 2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."). In light of the overall scheme and purpose of the PLRA, this Court should apply the Act to Janes and those similarly situated.

A contrary reading of subsection (d) ignores the import of the entire statute, which is to curb and control litigation regarding prison conditions. *See* 42 U.S.C. § 1997e(a) (prohibiting suits regarding "prison conditions" prior to exhausting administrative remedies), (c) (addressing *sua sponte* dismissal of frivolous suits regarding prison conditions), (f) (addressing hearings on suits concerning "prison conditions"). The Act was designed to deal with "prison conditions" and "prison litigation" cases such as the case at bar. In this regard, the PLRA was not enacted to simply restrict frivolous suits by those still in prison. The PLRA was enacted to curb and control all litigation over prison conditions. However, the Fifth Circuit has interpreted section 1997e so that it does not apply to suits filed by former

prisoners whose cause of action arose out of their incarceration. This decision has created an arbitrary distinction between suits filed while the plaintiff was in prison and those filed after release. For example, if two prisoners suffer the same constitutional violation and one is released a day before the expiration of the statute of limitations runs while the other remains incarcerated, the released individual has greater potential to attract counsel and obtain greater recovery than the individual who remained in prison.

This result would also produce an uneven result regarding subsection (e). According to the court's rationale, subsection (e) would preclude suits for mental and emotional injuries of a plaintiff incarcerated throughout the limitations period, while a plaintiff who was released even a day prior to the expiration of the statute of limitations could file such a cause of action.

Further, applying the Fifth Circuit's interpretation of "any suit brought by a prisoner" has the undesirable effect of encouraging delay and a multiplicity of lawsuits. It would encourage litigants to wait until they are released from incarceration before filing lawsuits for damages. Finally, the Fifth Circuit's interpretation will raise the question of whether prison officials manipulated an inmate's release date so as to prevent him from filing suit.

CONCLUSION

For the reasons stated above, Petitioner Bastrop County respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ROBERT S. DAVIS
FLOWERS, DAVIS, FRASER,
DERRYBERRY & VAN CLEEF, L.L.P.
Attorneys for Petitioner
815 Rice Road
Tyler, Texas 75703
(903) 534-8063

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JULY 7, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 99-50092
& 99-50141

BOBBY JOE JANES, III,

Plaintiff-Appellee,

versus

RICHARD HERNANDEZ, Sheriff of
Bastrop County, Texas; ET AL.,

Defendants,

BASTROP COUNTY,

Defendant-Appellant.

Appeals from the United States District Court for
the Western District of Texas

July 7, 2000

Before REAVLEY, SMITH and EMILIO M. GARZA,
Circuit Judges.

Appendix A

REAVLEY, Circuit Judge:

Bobby Joe Janes was injured by another inmate in the Bastrop County jail and has recovered judgment against the County on a jury verdict that found the unsafe condition of the jail to be due to the Sheriff's policy and deliberate indifference. The County complains on appeal of the lack of evidence that the County policymaker, the Sheriff, knew of the unsafe condition and also objects to the amount of the attorney fee award. We affirm.

COUNTY LIABILITY

Janes was arrested because of traffic offenses and was confined with more than eight other inmates, some of them felons who had histories of violence. Janes was threatened with death, awakened in his bunk as he was being bound, kicked in the head and had his face injured when smashed into the wall. Despite the continuous fighting and abuses within the large cell, and the admitted fact that the jail officers expected the prisoners to fight and abuse one another during the duty shifts, the Sheriff maintained a policy of confining together inmates of no propensity for violence with dangerous people. Whatever their history, no one was denied access to helpless inmates until the former demonstrated violent behavior in the jail. His conduct outside of the jail did not matter. The policy was to leave the inmate to self-defense unless an officer on an hourly round learned of abuse and obtained a superior's consent to do more to protect the inmate.

Bastrop County argues that it was not proved that the policymaker knew the prisoners who injured Janes were a

risk of harm to him. That is not necessary. Janes only needed to prove that the policymaker knew there was a substantial risk of serious harm to the inmates under his policy or custom of housing all manner of inmates together. That policy created an unsafe jail and the substantial risk that inmates would be injured. Fights were the order of the jail, to which the Sheriff was necessarily deliberately indifferent. That proof satisfies the legal requirement for county liability. *Hare v. City of Corinth, Ms.*[1]

ATTORNEY FEE

The County argues that the Prison Litigation Reform Act, 42 U.S.C. § 1997e limited the attorney fee to less than the district court awarded. We agree with the Eighth and Seventh Circuits which have held that this Act applies to only those suits filed by prisoners. *Doe v. Washington County*;[2] *Kerr v. Puckett*.[3] Because Janes was not a prisoner when this complaint was filed, the fee limits of the Act did not apply.

AFFIRMED.

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1. 74 F.3d 633, 650 (5th Cir. 1996).

2. 150 F.3d 920, 924 (8th Cir. 1998).

3. 138 F.3d 321, 322-23 (7th Cir. 1998).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION DATED AND FILED DECEMBER 10, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A-97-CA-496-SHC

BOBBY JOE JANES, III,

Plaintiff,

v.

JAMES HOFFMAN, in his Official
and Individual Capacities,

Defendant.

ORDER

Before the Court is **Defendants' Renewed Motion for Judgment as a Matter of Law and, in the Alternative, Motion to Amend Judgment** filed on November 23, 1998 (#76). Plaintiff filed his Response in opposition on December 7, 1998 (#80).

In the motion, Defendants argue that Plaintiff failed to introduce legally sufficient evidence for the jury to find for him on his claim against Bastrop County, thus, Defendants are entitled to judgment as a matter of law, citing *Wardlaw*

v. Inland Container Corp., 76 F.3d 1372, 1375 (5th Cir. 1996). Defendants assert that the motion is grounded on four reasons, which are each discussed below.

Plaintiff responds to counter each of Defendants' arguments.

A. *Standard for Granting Judgment as a Matter of Law.*

Federal Rule of Civil Procedure 50(a), which provides for a motion for judgment as a matter of law,[1] states:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

The test to be applied by the district court when considering a motion for judgment as a matter of law is as follows:

> [T]he Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all

1. This type of motion was called a motion for directed verdict before December 1, 1993.

> reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied. . . .

Wardlaw v. Inland Container Corp., 76 F.3d 1372, 1375 (5th Cir. 1996) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)); *see also Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1225 (5th Cir. 1996) (same).

A conflict in substantial evidence must exist to create a jury question. *Wardlaw*, 76 F.3d at 1375 (citing *Boeing*, 411 F.2d at 375); *Holt*, 89 F.3d at 1225. "A directed verdict is appropriate only when the facts and inferences point so strongly in the movant's favor that no reasonable jury could reach a contrary conclusion." *Becker v. Paine Webber, Inc.*, 962 F.2d 524, 526 (5th Cir. 1992) (noting that "a court must examine the entire record in the light most favorable to the nonmovant and draw all inferences in that party's favor.").

B. *Defendants' Motion for Judgment as a Matter of Law and Plaintiff's Response*

As their first reason, Defendants argue that their motion should be granted because this is an episodic act or omission

case, meaning that, under applicable case law, Bastrop County can be held liable only if Plaintiff first proves that Defendant Hoffman acted with subjective deliberate indifference. Because the jury found that Defendant Hoffman did not so act, Bastrop County cannot be liable for Plaintiff's injuries. As support, Defendants cite *Scott v. Moore*, 114 F.3d 51, 54 (5th Cir. 1997) and *Flores v. County of Hardeman*, 124 F.2d 736, 739 (5th Cir. 1997).

Plaintiff argues that his suit challenges the conditions of confinement in the Bastrop County Jail, i.e., that it is a constitutional attack on general conditions, practices, rules, or restrictions of the jail. Plaintiff argues that the evidence shows that Bastrop County had actual knowledge that its housing pattern and practice had continuously resulted in violent inmates assaulting non-violent inmate and took no corrective action. Plaintiff argues that the evidence shows that, by Bastrop County's maintenance of the complained of jail conditions, policies, and practices, it intended to cause the alleged constitutional deprivations. This Court agrees with Plaintiff.

"In an 'episodic act or omission' case, an actor usually is interposed between the detainee and the municipality, such that the detainee complains first of a particular act or, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission." *Scott*, 114 F.3d at 53. Defendants are correct that, for pretrial detainees asserting a claim based upon an episodic act or omission, they must show "that the constitutional violation complained of was done [on the part of the jail official] with subjective

deliberate indifference to the detainee's constitutional rights." *Id.* at 54. The detainee can then hold the municipality accountable if he can show that "the predicate episodic act or omission resulted from a municipal custom, rule, or policy adopted or maintained with objective deliberate indifference to the detainee's constitutional rights." *Id.* The ruling in *Flores* also involved a pretrial detainee and an episodic act or omission situation and required that the detainee first prove that the jail official individually acted with subjective deliberate indifference before the municipality could be held liable for the due process violation. *Flores*, 124 F.3d at 739.

However, this Court declines to apply those cases because they involved pretrial detainees. Although the appellate court in *Hare v. City of Corinth* stated "that the State owes the same duty under the Due Process Clause and the Eighth Amendment to provide both pretrial detainees and convicted inmates with basic human needs including medical care and protection from harm, during their confinement," the court then went on to state what a *pretrial detainee* must show in order to establish a constitutional violation in a jail conditions case which involves an episodic act or omission. *Hare*, 74 F.3d 633, 647-48, 650 (5th Cir. 1996) (emphasis added). Subsequent case law has continued to distinguish between cases involving convicted inmates and pretrial detainees and the different bases from which their constitutional rights flow: the constitutional rights of convicted inmates flow from the Eighth Amendment's prohibition on cruel and unusual punishment and the constitutional rights of pretrial detainees flow from both the procedural and substantive due process guarantees of the Fourteenth Amendment. For example, the trial court in

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Lawson v. Dallas County, et al, 1998 WL 246642 (N.D. Tex. 1998) specifically stated that, because the inmate was a convicted prisoner, the pretrial detainee cases and their tests, including the *Scott* case, were not available to him. To establish an Eighth Amendment claim, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm" and, second, that the prison official acted with subjective deliberate indifference to the inmate's health or safety. *Farmer v. Brennan*, __ U.S. __, 114 S.Ct. 1970, 1977-79 (1994).

Here, Plaintiff, having been previously convicted and on probation, is not a pretrial detainee and, thus, brings a general conditions case under the Eighth Amendment. There is no need for the jury to have made a predicate finding that Defendant Hoffman was liable in his individual capacity in order to impose liability on Bastrop County for Defendant Hoffman's acts in his official capacity. This is not a pretrial detainee, episodic act case which requires that a jail official first be found to have been individually deliberately indifferent before liability can be placed on the County.

As a second point, Defendants argue that there is no evidence that Bastrop County was deliberately indifferent to the health or safety of its inmates. They claim that the only specific evidence of assaultive-type conduct was the evidence pertaining to the assault of Plaintiff and any other evidence that other inmates could have been victims of assault was ambiguous and fails to provide a basis that it was plainly obvious or known that Bastrop County inmates were exposed to a high risk of harm from other inmates. Additionally, Defendants assert that evidence of assaultive-

type conduct was not shown to be related to Bastrop County's classification of inmates.

Plaintiff responds to state that several witnesses, including Sgt. Hoffman, Officer Campbell, Kim Frost, and Lt. Littleton, were aware of weekly fights and violence between and among inmates prior to the assault on Plaintiff. They testified that violence was expected at any time. Thus, the jury obviously took note of the violence which was occurring in the jail, whether defined as fights between inmates or assaults on inmates. Plaintiff argues that, although Bastrop County had a classification system, it was not used,[2] and inmates were housed on a space available basis and were not separated according to their violent nature. Thus, the jury was presented ample evidence and answered the questions in the affirmative that Defendant Hoffman, in his official capacity, and thus, Bastrop County, had actual knowledge that Plaintiff was incarcerated under conditions posing him a substantial risk of serious harm and that the prison official acted with subjective deliberate indifference to Plaintiff's health or safety.

As a third point, Defendants argue that the Bastrop County's compliance with the classification standards established by the Texas Commission on Jail Standards shows, as a matter of law, that the county was not deliberately indifferent to the health or safety of its inmates. Defendants

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2. The classification system mainly differentiated between first-time offenders and repeat offenders. The Court notes that Plaintiff, when arrested as a first-time offender, was not placed in the first-time offender cell, but was put in general population, a violation of the classification system.

argue that the testimony of one of Plaintiff's rebuttal witnesses, Terry Julian, the Director of Operations for the Texas Commission on Jail Standards, stated that the classification system in effect at Bastrop County at the time of the event at issue was in compliance with the guidelines of the Texas Commission on Jail Standards. Also, Mr. Julian testified that it was proper for Plaintiff and his assailant to be housed together under these guidelines. Defendants assert that this testimony shows that Bastrop County was not deliberately indifferent to the health or safety of its inmates.

Plaintiff responds to argue that, while Bastrop County had a classification system which it presented to the Texas Commission on Jail Standards, its actual policy, practice, and procedure involved housing inmates on a space available basis with no other factors considered. Plaintiff argues that the jury found that such a policy, practice and procedure showed deliberate indifference to the health and safety of Plaintiff.

As a fourth point, Defendants argue that there is no evidence to support the jury's award of $35,000 to Plaintiff for future medical expenses. At best, the only evidence presented on the cost of future medical care was the testimony of Plaintiff when he stated that he was entitled to $10,000 for future medical care. However, Defendants assert, Plaintiff was incompetent to testify as to the cost of future medical care.

Plaintiff responds to argue that Dr. Ross had testified as to the medical care which Plaintiff would need in the future, including several medical alternatives. Plaintiff argues that

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Federal Rule of Evidence 701 allows Plaintiff, who was not testifying as an expert, to give his opinion as to a minimal cost of one of the alternative procedures described by Dr. Ross.[3]

This Court determines that it was permissible for Plaintiff to state his opinions and perceptions regarding the minimum costs of any corrective medical procedure which he might undergo in the future.[4]

Jury verdicts on damages may be overturned only upon a clear showing of excessiveness or upon a showing that they were influenced by passion or prejudice. *Westbrook v.*

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3. Federal Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

4. Neither side presented expert testimony in this case. Pursuant to a motion from Defendants, Plaintiff was barred by court order from presenting any expert witnesses because he had failed to disclose his lists of expert witnesses, required by Local Rule CV-16(e), by the date to do so (which date had been set in the scheduling order). Thus, Plaintiff was limited to presenting fact witnesses. In that same court order, the Court noted that Defendants also had not complied with the witness disclosure requirements. Had they chosen to present expert testimony, they likely would have been prohibited from doing so. Defendants only presented fact witnesses.

General Tire and Rubber Co., 754 F.2d 1233, 1241 (5th Cir. 1985). A more recent case, citing *Westbrook*, stated that "[t]here is a strong presumption in favor of affirming a jury award of damages. The damage award may be overturned only upon a clear showing of excessiveness or upon a showing that the jury was influenced by passion or prejudice." *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995). "A verdict is excessive if it is "contrary to right reason" or "entirely disproportionate to the injury sustained." *Eiland*, 58 F.3d at 183 (citing *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983)). As the *Caldarera* court stated:

> We do not reverse a jury verdict for excessiveness except on "the strongest of showings." The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as "clearly exceed[ing] that amount that any reasonable man could feel the claimant is entitled to." Nonetheless, when a jury's award exceeds the bounds of any reasonable recovery, we must suggest a remittitur ourselves or direct the district court to do so.

Caldarera, 705 F.2d at 784.

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Testimony was presented to the jury which showed that Plaintiff will need extensive future medical treatment. No controverting evidence was presented that Plaintiff would not need future medical care. The jury had before them the $10,000 figure from Plaintiff's testimony. The jury evaluated Plaintiff's need for medical treatment and determined an amount which would pay for said treatment. The Court determines that the jury's estimated amount of $35,000 of future medical care is not unreasonable nor entirely disproportionate to the injury sustained. Additionally, there has not been the "strongest of showings" to cause the Court to omit or modify the jury's verdict,

After reviewing the merits of Defendants' motion for judgment as a matter of law, the Court finds that there is no reason to grant the motion.

C. *Defendants' Motion to Amend Judgment and Plaintiff's Response*

Alternatively, Defendants seek to amend the judgment to reflect that Bastrop County is the judgment debtor and not Defendant James Hoffman in his official capacity. Defendants argue that Bastrop County is the real party against which the judgment has been entered and to maintain the judgment as entered may have serious implications for Defendant Hoffman as a practical and personal matter. Plaintiff responds in opposition to this request.

The Court agrees that the action against Defendant Hoffman in his official capacity is actually an action against Bastrop County. *Kentucky v. Graham*, 473 U.S. 159, 165-66,

105 S.Ct. 3099, __ (1985); *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690 n.55, 98 S.Ct. 2018 (1978); *Esteves v. Brock*, 106 F.3d 674, 677 (5th Cir. 1997). Thus, the judgment will be amended to reflect that Bastrop County will be substituted in place of Defendant James Hoffman in his official capacity, and Bastrop County will be liable for the payment of damages awarded to Plaintiff against Defendant Hoffman in his official capacity.

It is therefore ORDERED that Defendants' Renewed Motion for Judgment as a Matter of Law is DENIED, and Defendants' alternative request for relief made in their Motion to Amend Judgment is GRANTED and the judgment will be amended to substitute Bastrop County in place of Defendant James Hoffman in his official capacity, with Bastrop County being liable for the payment of damages awarded to Plaintiff against Defendant Hoffman in his official capacity.

SIGNED this 10th day of December, 1998.

s/ Stephen H. Capelle
STEPHEN J. CAPELLE
UNITED STATES MAGISTRATE JUDGE
Presiding under 28 U.S.C. § 636(c)

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION DATED AND FILED JANUARY 26, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A-97-CA-496-SHC

BOBBY JOE JANES, III,

Plaintiff,

v.

JAMES HOFFMAN, in his Individual Capacity and BASTROP COUNTY,

Defendant.

ORDER

Before the Court is **Plaintiff's Motion for Reconsideration on Court's Order on Attorney's Fees filed December 29, 1998** (#89) and Plaintiff's Response to Plaintiff's Motion for Reconsideration of Court's Order on Attorney's Fees filed January 7, 1999 (#90) and **Defendants' Motion for Reconsideration of Order of December 23, 1998** (#88).

This is the second request for reconsideration of the orders this Court has entered on the attorney's fees to be

awarded to Plaintiff. In the first order, filed December 10, 1998 (#81), this Court awarded attorney's fees to Plaintiff pursuant to 42 U.S.C. § 1988.[1] In the second order, filed December 23, 1998 (#87), after Defendants' first request for reconsideration, the Court determined that the Prison Litigation Reform Act ("PLRA") applied and, for time expended by Plaintiff's counsel after the effective date of the PLRA, or April 26, 1996, the hourly rates charged must be limited as stated in amended 42 U.S.C. § 1997e. In other words, all time expended after April 26, 1996 would be paid at a rate of $97.50 per hour for work during trial and $67.50 per hour for other, pretrial work, with such rates being calculated at 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel. *See* 42 U.S.C. § 1997e(d)(3).[2] The second order on attorney's fees also ruled on Plaintiff's request for costs and reimbursable expenses which had been overlooked in Plaintiff's motion for attorney's fees.

Now, Plaintiff argues in his motion to reconsider that the fee-limiting provisions of the PLRA should not be applied

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1. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . . 42 U.S.C. § 1988(b).

2. In the Western District of Texas, attorneys appointed under the Criminal Justice Act receive compensation at the rate of $45.00 per hour for pretrial work and $65.00 per hour during trial. Therefore, under the PLRA's cap, Plaintiff's attorneys were limited to a maximum hourly rate of $67.50 (150 percent of $45.00) for pretrial work and $97.50 (150 percent of $65.00) during trial.

to his request for attorney's fees because Plaintiff was not "a prisoner who is confined to any jail, prison, or other correctional facility" when this suit was filed. Plaintiff argues that, as of the time of the triggering event, which is the bringing of his suit, Plaintiff was a free man, not a prisoner. Thus, Plaintiff requests that the Court reinstate the original amount of attorney's fees awarded under 42 U.S.C. § 1988 in the first order, together with the court costs and expenses allowed in the second order. He also requests that the Court add as taxable court costs the $35.00 incurred to obtain Plaintiff's medical records which were offered as trial exhibits, the $90.00 cost for exhibit blow-ups which were exhibited before the jury, and $35.46 for copies which was incurred to make duplicates of medical records, exhibits and materials produced in trial.

Defendants respond to Plaintiff's motion to argue that a better reading of the PLRA, one which is in keeping with the "entire scheme of that statute," requires that the PLRA be applied to Plaintiff's fee request. Defendants argue that the purpose of the fee-limiting provision of the PLRA is to curb litigation regarding prison conditions, which Plaintiff's suit involved. Further, to not apply the PLRA would create an arbitrary situation in which persons who are still incarcerated when they file suit will have any award of attorney's fees limited by § 1997e, but those persons who can wait to sue after being released will not have any such limitation (subject only to the limitations of fee requests made under 42 U.S.C. § 1988 or other law). Defendants argue that the cases applying the PLRA's *in forma pauperis* procedures found at 28 U.S.C. § 1915, which have determined that the PLRA's procedures apply *if* the inmate is still incarcerated

at the tine of the action in question, e.g., such as filing a suit or an appeal, do not govern this situation because this situation involves a totally separate provision of the PLRA which amended a totally separate statute, being § 1997e.

Defendants, in their own motion for reconsideration, request that the Court reconsider its order of December 23, 1998 and: 1) apply the PLRA to all of the time Plaintiff's counsel expended on the file, not just the hours expended after the effective date of the PLRA, 2) decrease the number of hours for which counsel was compensated, 3) decrease the hourly rate of compensation for the paralegal time, and 4) stay enforcement of the award of attorney's fees until after the resolution of the appeal of the underlying case.

The Court has reviewed the arguments made in the above pleadings, has reviewed the amendments brought about by the PLRA, and has done more legal research to determine if there are any new cases to guide a decision. The Court must decide if the fee-limiting provisions of the PLRA apply to this case: Plaintiff was not incarcerated at the time he filed suit but his suit deals with jail conditions which existed at the time he was incarcerated. No courts in the Fifth Circuit have ruled on this issue. However, the Fifth Circuit has ruled on whether to apply the PLRA's modifications to the *in forma pauperis* procedures set forth at 28 U.S.C. § 1915, and this Court will use these cases as a guide. The Fifth Circuit has held that the *in forma pauperis* provisions apply to suits pending in the district court on the effective date of the PLRA, *Larson v. Scott*, 1998 WL 704000 at 2 (5th Cir. Oct. 26, 1998) (prisoner suit); to appeals pending on the effective date of the PLRA, *Strickland v. Rankin County Correctional*

Facility, 105 F.3d 972, 974 (5th Cir. 1997) (prisoner appeal); and to appeals brought by prisoners who are, during the pendency of their appeal, released from incarceration, *Gay v. Texas Dept. of Corrections State Jail Div.*, 117 F.3d 240, 242 (5th Cir. 1997). The Fifth Circuit has determined that the *in forma pauperis* procedures directed to "prisoners" do not apply to an appeal brought by a prisoner who has been released from custody before filing his appeal. *Haynes v. Scott*, 116 F.3d 137, 140 (5th Cir. 1997).

Here, the Court decides that Plaintiff's argument is correct and that the fee-limiting provisions of the PLRA should not apply to this case. Plaintiff was not incarcerated at the time that he brought this suit. At least one other court has so held. *See Watson v. Sheahan*, 1998 WL 708803 at 3 (N.D. Ill. Sept. 30, 1998) (PLRA did not limit fee request of attorney representing a class of individuals who were allegedly detained for an unconstitutional period of time after their legal release from custody). Because the Court finds that § 1997e(d) does not apply to this case, there is no need to discuss Defendants' argument that the hourly rate for the paralegal time should be decreased in accordance with the general scheme of the PLRA.

The Court now addresses Defendants' request that the Court reconsider the number of hours awarded to Plaintiff's counsel. Defendants argue that the Court overlooked Defendants' objection in their first request for reconsideration that the hours Plaintiff's counsel sought were excessive. The Court had not, in fact, overlooked Defendants' "objection" which was made in footnote 2 of their Motion for Reconsideration of Order on Attorney's Fees filed

December 11, 1998 (#84). In this footnote, Defendants stated that "Defendants do not concede that Plaintiff is entitled to compensation for every hour claimed to have been worked on this case." They then referred to their Exhibit D, which was a hand-written letter to Plaintiff's counsel from one of Defendants' counsel which set forth objectionable time entries totaling 31.45 hours, with a statement that if counsel would agree to delete 20 hours from the bill, then Defendants could agree to the number of hours counsel was requesting, but not the rate to be applied. For only one of the objectionable time entries, or 2.3 hours expended by counsel on the amended petition, do Defendants set for a reason for their objection. Thus, the Court treated Exhibit D as a negotiation document sent between the parties. It, along with the language stated in footnote 2, certainly do not rise to the level of a formal objection to a fee application.[3]

In any event, the Court has again looked at the time entries set forth on the invoice attached by Plaintiff's counsel to Plaintiff's Motion for Attorney's Fees filed November 23, 1998 (#77), and the time entries to which Defendants object. The Court concludes the following:

1) the time entries which Defendants have listed under the heading "Drafting Petition" and totaling 12.05 seem

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3. Besides being hand-written, the "objection sheet" contains some inaccuracies: time entries were assigned the wrong date, the objection lists the wrong amount of time spent for a date or no amount of time is listed, or the full description for the work performed for a time entry is not set forth. These factors also caused the Court to consider that Exhibit D was not a formal objection, but was a working copy of the parties' negotiations as they attempted to work toward an agreement on the number of hours expended.

overly excessive at first view; however, the time is spread out over nearly two years and includes one hour of paralegal time and 1.5 hours of Lloyd Willis' time.[4] Deleting this 2.5 hours, Mr. Taylor spent 7.55 hours of objected to time and 2.4 of unobjected to time drafting and signing the petition, an amount which is still excessive. The Court considers that Mr. Taylor's time should be decreased by 5 hours.

2) the time entry which Defendants list as .75 hour for 6/25/97 for Mr. Taylor to file the petition should have been billed, but was not, at a paralegal rate. Thus, this .75 hour will be billed at Ms. Campos' rate of $75.00 per hour.

3) Defendants object to the time entry of 2.3 hours for 11/21/97 for Mr. Taylor to research the amended petition, arguing that all Mr. Taylor had to do to comply with a court order was to drop two defendants from the case and refile the complaint, and, thus, should not have spent that much time. Mr. Taylor's time entry for this date shows that he reviewed the court's order of 11/20/97 [which required him to effectuate service on two defendants or dismiss them from the suit], researched the amended petition, worked on his response to Defendants' Rule 12(b) motion, and worked on discovery. Defendants did not object to a 3.0 hour time entry for 11/26/97 by Mr. Taylor to analyze Defendants' First Supplemental Answer and to prepare the amended petition. A review of the amended complaint shows that the

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4. Defendants do not include in their objection .75 hours spent by Lloyd Willis on 4/10/96 drafting the petition or 2.4 hours spent 6/16/97 by Mr. Taylor to review the file and draft the petition.

amendments to the complaint were more than merely dropping two defendants; counsel also dropped two causes of action brought under 42 U.S.C. §§ 1985 and 1986. Thus, Mr. Taylor spent 5.3 hours on this file on 11/21/97 and 11/26/97, with the majority of the time likely spent on drafting the amended petition. However, without more detail in the time entries, this Court has no way to apportion the time between the various tasks spent on those days. Thus, assuming that the majority of the time was spent on drafting an amended petition, the Court considers the time excessive and will delete the 2.3 hours requested.

3) Defendants object to multiple time entries from 6/12/97 [the time amount for this entry is incorrectly listed by Defendants as 2.4 hours when it is shown on the invoice as 2.1 hours] to 12/9/97 [Defendants show no time amount included for that latter date] under their heading of "Drafting Discovery" and which entries total 16.35 hours. A review of these time entries shows that the work described includes other activities than just discovery work, including Mr. Taylor's appearance at a docket call before the District Court, working out the parties' consent to the Magistrate Court [per the docket sheet notation for the docket call], and a conversation with the Clerk of the Court regarding dismissing two defendants, for an amount of 2.0 to 2.75 hours, leaving about 14 hours devoted to discovery work.

Unfortunately, Mr. Taylor's work descriptions for this discovery work could be much more detailed and should provide more information regarding the work actually performed and not just "discovery, interrogatory." The time entries need not describe in excruciating detail the work

performed by the hour or fraction of the hour but must give sufficient information for a court to have some idea of the work which was done. *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 326-27 (5th Cir. 1995). The Fifth Circuit in *Louisiana Power* did give deference to the trial court's decision to not find the entries in that case as being too vague, given the trial court's familiarity with the case and its review of the time records as a whole. *Id.* Likewise, this Court is familiar with the case and can review the time sheets in conjunction with the docket sheet of the case to flesh out the meaning of some entries; however, others are too vague. Additionally, the Court notes that other time entries dated after 12/9/97, not objected to by Defendants, total about 35 or more hours spent on discovery matters. The total amount of discovery time, 14 and 35 hours, seems excessive without more detailed time entries. The Court will delete seven hours from the time entries to which Defendants have objected.

The Court has reviewed the other time entries and finds them sufficient and not unreasonable, given that the majority of Plaintiff's counsel's time was then spent preparing for a one week trial.

In the December 10, 1998 order, this Court found that Plaintiff was a prevailing party. The Court's reasoning and decision made in the December 10, 1998 order on attorney's fees holding P tiff to be a prevailing party is unchanged and remains in effect. In that same order, as well as in the second December 23, 1998 order, the Court found that Plaintiff should be compensated for the paralegal time spent on the file, and that decision is incorporated herein by reference.

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In the December 10, 1998 order, the Court has already found that the requested rates were reasonable, based upon a review of the declaration of Plaintiff's attorney and the other documentation submitted. After consideration and application of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), the Court made no adjustment upward or downward to the fee based upon any of the twelve factors set forth in *Johnson*. The Court's prior decision in the December 10, 1998 order regarding the reasonableness of the rates and the consideration of the *Johnson* factors is incorporated herein.

The lodestar, therefore, will be calculated as follows:

1) Bobby R. Taylor — 226.3 hours[5] multiplied by $250.00 per hour for $56,575.00 and .75 hours at $75.00 for $56.25, for a total of $59,956.25;

2) Lloyd Willis — 5.05 hours multiplied by $150.00 per hour for $607.50, for a total of $757.50; and

3) Annie Campos — 26.15 hours pretrial multiplied by $75.00 per hour for $1,961.25.

The work for the three individuals totals to a lodestar amount of $59,350.00.

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5. This amount comes from the total hours requested of 241.35 hours less 5.0, 2.3, 7.0, and .75 (billed at $75).

Appendix C

Costs and Expenses.

The Court has also reviewed Plaintiff's request that the Court modify its decision on which costs are costs taxable against Defendants. He requests that the Court add as taxable court costs the $35.00 incurred to obtain Plaintiff's medical records which were offered as trial exhibits, the $90.00 cost for exhibit blow-ups which were exhibited before the jury, and $35.46 for copies which was incurred to make duplicates of medical records, exhibits and materials produced in trial. The Court previously determined that some of the expenditures for which Plaintiff requests reimbursement fall into one of the six categories listed in 28 U.S.C. § 1920, as allowed to prevailing parties under Federal Rule 54(d)(1), but other fees, falling outside the cost categories set forth in § 1920, could be awarded as part of the attorney's fees award under Rule 54(d)(2) as "related nontaxable expenses" and may include any litigation expenses that are customarily borne by clients in similar cases.

Regarding the $35.00 charge for the Smithville Regional Hospital Medical Records, Plaintiff now states that the records were offered as trial exhibits. The charge appears reasonable. Thus, this charge can be included by Plaintiff in a bill of costs he is to file with the Clerk of the Court, as directed below, as a cost "necessarily obtained for use in the case" under § 1920(2).

Plaintiff requests that $35.46 in copy costs be allowed as a taxable cost because the copies of medical records, exhibits and other materials were used in the trial. The $35.46 charge appears reasonable, at $0.05 per page. Thus, this

charge can be included by Plaintiff in a bill of costs he is to file with the Clerk of the Court, as directed below, as a cost "necessarily obtained for use in the case" under § 1920(2).

This Court has previously denied Plaintiff's request for $90.00 incurred making exhibit blow-ups for trial to be taxed as a cost. Some courts have held such a charge to not be taxable as a cost. *See Nelson & Trapp v. Sisters of Charity of the Incarnate Word*, 967 F. Supp. 929, 933 (S.D. Tex. 1997); *Ganz v. Lyons Partnership, L.P.*, 173 F.R.D. 173, 178 (N.D. Tex. 1997). The Court has done more research and has determined that other courts in the Fifth Circuit have allowed enlargements as taxable costs if the party first received prior court approval of the cost, *see Louisiana Power*, 50 F.3d at 335; *Studiengesellschaft Kohle v. Eastman Kodak*, 713 F.2d 128, 133 (5th Cir. 1983); *Datapoint Corp. v. Picturetel Corp.*, 1998 WL 401630 (N.D. Tex. July 9, 1998), or possibly allowed if the enlarged exhibit was admitted into evidence, *see Card v. State Farm Casualty Co.*, 126 F.R.D. 658, 661 n.2, 661-662 (N.D. Miss. 1989). Here, Plaintiff neither obtained prior approval for this expense nor were the enlarged exhibits admitted into evidence. This charge is properly categorized as a taxable expense, but it is to be disallowed.

From the above, it is ORDERED that:

1) the fee limiting provisions of the PLRA do not apply to this case;

2) Plaintiff is awarded total attorney's fees of $59,350.00 against Defendant Bastrop County pursuant to 28 U.S.C. § 1988; and

3) $762.91 to be taxed as costs against Defendant Bastrop County, said amounts being $150.00 as the complaint's filing fee, $200.00 as witness and service fees, and $342.45 as deposition fees, $35.00 for medical records, and $35.46 for copies, for which Plaintiff is to file a bill of costs with the Clerk of the Court *on or before February 5, 1999.*

It is further ORDERED that the total award of $59,350.00 in attorney's fees shall bear interest from the date of December 10, 1998, until paid, at the current post-judgment interest rate obtained at the most recent auction of 52-week U.S. Treasury T-Bills, as allowed under 28 U.S.C. § 1961. The amount of $762.91 determined in this order taxable costs against Defendant will included as part of the judgment in this case, and thus, bear post-judgment interest, upon Plaintiff's filing of a bill of costs and its allowance.

It is further ORDERED that Defendants' obligation to pay this award of attorney's fees and costs is stayed until the resolution of the appeal of the underlying case.

SIGNED this 26th day of January, 1999.

s/ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE JUDGE
Presiding under 28 U.S.C. § 636(c)

APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 16, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50092
Consolidated with No. 99-50141

BOBBY JOE JANES, III

Plaintiff – Appellee

v.

RICHARD HERNANDEZ, Sheriff of
Bastrop County, Texas; ET AL

Defendants

BASTROP COUNTY

Defendant – Appellant

Appeals from the United States District Court for the
Western District of Texas, Austin

ON PETITION FOR REHEARING AND
REHEARING EN BANC
(Opinion 7/7/00, 5 Cir., __, __ F.3d __)

Appendix D

Before REAVLEY, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ Thomas M. Reavley
United States Circuit Judge

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Appendix E

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * *

42 U.S.C. § 1997e (2000)

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure. The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act [42 USCS § 1997a or 1997c].

Appendix E

(c) Dismissal.

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees.

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that —

(A) the fee was directly and reasonably incurred in proving an actual violation

of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the

amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

(e) Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) Hearings.

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone,

video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined. As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

* * * *